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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted]1969

WILLIAM A. AGORANOS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINION BELOW

The petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered April 2, 1969 in *Agoranos* v. *United States* (Case No. 25997), which has not yet been reported. A copy of the subject opinion is in the Appendix hereto as pages 7, 8, 9 and 10.

Reference is made in this petition to the Certified Record as (R).

JURISDICTIONAL STATEMENT

The opinion and judgment of the United States Court of Appeals was rendered April 2, 1969 (R. 284-288). A petition for rehearing was filed on April 11, 1969 and was denied on April 30, 1969, without opinion. (R. 298; *infra*, p. 12).

The jurisdiction of this Court rests on The Judicial Code, 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the holding of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) requires Fifth and Sixth Amendment warnings to be given to a taxpayer who is the subject of a tax fraud investigation, although the taxpayer is not in custody at the time of a pre-indictment interrogation?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States which provides in pertinent part:

> . . . nor shall (any person) be compelled in any criminal case to be a witness against himself . . . .

The Sixth Amendment to the Constitution of the United States which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in a tax fraud case. The petitioner appealed to the Court of Appeals (R. 67) from final judgments of the United States District Court for the Middle District of Florida, in two cases consolidated for trial, upon a jury verdict finding the petitioner guilty of filing false and fraudulent income tax returns in violation of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201. (R. 65, 66).

The issue *sub judice* arises from the testimony of Government witness, William J. Carlton, a Criminal Investigator employed by the Internal Revenue Service. (Carlton Testimony R. 53-63).

A criminal investigation of the petitioner's tax case began in April, 1963. Carlton testified that he interviewed

the petitioner on July 29, 1963, and that he did not give any warning of the Fifth Amendment privilege at that time because he was investigating another taxpayer, and interviewed the petitioner as a prospective witness in the other taxpayer's case. (R. 58-60).

The petitioner objected to any testimony by Carlton concerning the mentioned interview on the ground that it violated his Fifth Amendment privilege. (R. 57). A voir dire of the witness was conducted without the jury present (R. 54), at which time Carlton stated that on July 29, 1963, he was investigating a certain Thomas Butman of Las Vegas, Nevada. (R. 55, 58-61). Carlton asked the petitioner if he had ever had any dealings with the Saratoga Book and Turf Club in Las Vegas. The petitioner answered "no." (R. 60, 62-63). Carlton then produced copies of two cashier's checks evidencing a transaction between the petitioner and Butman, and the petitioner admitted that he had a loan transaction with Butman.

The District Court overruled the objection to Carlton's testimony on the basis of Carlton's statement that he had nothing to do with the petitioner's case at the time of the interview. (R. 61). Before the jury returned, however, the Assistant United States Attorney told the Court that the Special Agent in charge of the case was assigned to it on April 30, 1963, and that his first activity was on May 16, 1963. (R. 61).

Carlton was permitted to testify to the above facts concerning the petitioner's transaction with Butman.

REASONS FOR GRANTING THE WRIT

The Opinion Of The United States Court Of Appeals Is In Direct Conflict With The Decisions Of The Supreme Court In *Miranda* v. *Arizona* and *Orozco* v. *Texas*.

The decision of the United States Court of Appeals in the instant case, with respect to its discussion of the

Miranda doctrine, is in conflict with the constitutional standard as set forth by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and as explained in *Orozco* v. *Texas*, —— U. S. ——, 22 L.Ed. 2d 311 (1969).

In its opinion, the Court of Appeals answered the petitioner's argument concerning the objected-to-interrogation by stating that the *Miranda* doctrine required in-custody interrogation. The Court of Appeals recognized the possibilities implicit in *Mathis* v. *United States*, 391 U.S. 1 (1968), but on the petition for rehearing, it rejected the petitioner's argument that in *Orozco* v. *Texas*, —— U.S. —— 22 L.Ed. 2d 311 (1969) this Court emphasized that custody per se should not be raised to constitutional significance. In *Orozco*, this Court explained that Fifth and Sixth Amendment warnings are required when the person being interrogated is deprived of his freedom of action in any significant way.

The petitioner was deprived of the freedom to make an intelligent decision concerning the waiver of his Fifth Amendment privilege and Sixth Amendment rights when Government Agent Carlton not only failed to give any warning, but also negated the petitioner's need to make a decision when he claimed to be investigating another taxpayer. The latter circumstance proved, as a practical matter, to be incorrect because Carlton testified at the petitioner's trial concerning the mentioned interview. Thus, there was an affirmative misrepresentation by Carlton because the information obtained under the guise of the Butman investigation was actually used to establish that: (1) The petitioner did business with a Las Vegas, Nevada gambling figure; and (2), that the petitioner initially denied such a transaction. Evidence of a gambling connection in a tax fraud case may be crucial because it supplies a motive for tax evasion. The Court of Appeals observed that there was no objection of record *before the jury* to the gambling implication. The answer to that is: First, that the petitioner's counsel argued at length in the ab-

sence of the jury (R. 54-61), that the Carlton testimony should not be allowed; and secondly, that to have further developed the gambling connection before the jury on additional objection or on cross-examination would have compounded the injury, and perhaps waived the objection. In any event, it would have been an erroneous trial tactic.

The rationale of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) should be wholly applicable to tax fraud investigations, absent actual custodial interrogation. The object of *Miranda* was: (a) That no conviction should rest upon the accused's statements unless they have been made while the accused was aware of his constitutional right to remain silent and the consequences of relinquishing that right; and (b) that a suspect has a right to be free from coercive influence that would tend to make him incriminate himself. *Orozco* v. *Texas*, —— U.S. ——, 22 L.Ed. 2d 311 (1969). This rationale applies to a suspect in a tax fraud case because: (1) He is usually the only suspect in the case; therefore, the investigation has focused upon him; (2) he is not told that he is involved in a criminal investigation involving a felony, and that he may incriminate himself; (3) he is not told that he may have assistance of counsel; and (4) in the subject case, he was actually told that the questions concerned another taxpayer. What freedom of choice does such a taxpayer have? The coercion of actual custody has been replaced by total ignorance of the possible need to enjoy the constitutional privilege. If the taxpayer was not aware, then how could he exercise an intelligent waiver of his privilege and rights? How can this predicament be squared with *Johnson* v. *Zerbst*, 304 U.S. 458 (1938)?

For these reasons, it is submitted that the opinion of the Court of Appeals in this cause decides a substantial constitutional question in such a way as to conflict with the decisions of this Court in *Miranda* v. *Arizona*, *supra*; *Orozco* v. *Texas*, *supra*; and *Johnson* v. *Zerbst*, *supra*.

CONCLUSION

This application for writ of certiorari should be granted.

Respectfully submitted.

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May 16, 1969

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25997

WILLIAM A. AGORANOS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

April 2, 1969

Before PHILLIPS,* BELL, and MORGAN, Circuit Judges.

BELL, Circuit Judge: Appellant was convicted of filing false and fraudulent income tax returns in violation of § 7201 of the Internal Revenue Code of 1954, 26 USCA, § 7201. The income tax returns involved were of the years 1960, 1961, and 1962. His return reflected no taxable income for the year 1960 whereas the government claimed that he had taxable income of $13,295.60. Taxable income of $2,375.67 was reported for the year 1961 and the government claimed that the true taxable income was $10,732.45. For 1962, appellant reported $1,229.38 as taxable income and the government contended that his true taxable income was $11,773.95.

* Of the Tenth Circuit, sitting by designation.

Appellant's books and records were inadequate and the government established its case on the net worth approach.[1] The beginning point was net worth as of December 31, 1959. The jury resolved the issues against appellant and this appeal followed. We affirm.

There are two assignments of error. One is the contention that appellant's Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel were violated by the failure of an internal revenue investigator to give him a *Miranda* type warning at the time of an interview. *Miranda* v. *Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1062, 16 L.Ed.2d 694.

It appeared that the investigation of appellant had begun on April 30, 1963. Simultaneously the government was investigating the affairs of Thomas Butman to whom appellant had made a loan. On July 29, 1963, a special agent interviewed appellant regarding the repayment of the loan by Thomas Butman. No Miranda warning was given; in fact, the agent testified that he did not know at the time that appellant was being investigated. The Butman loan was included as a loan receivable in the beginning net worth statement and it is appellant's position that the entire new worth statement was rendered inadmissible by the failure to give the Miranda warning. Additionally, as we

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[1] The court stated in *Holland* v. *United States*, 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 120:

> "In a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an 'opening net worth' or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the differences between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income. . . ." 348 U.S. at 124.

perceive it, appellant claims that he was prejudiced by the disclosure that Butman was a Los Vegas gambler.

Assuming, *arguendo*, that the introduction of the Butman loan evidence prejudiced appellant, the short answer is that appellant was not in custody and the *Miranda* doctrine applies only to in-custody interrogation. Cf. *Mathis* v. *United States*, 1968, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed. 2d 381. Moreover, there was no objection to the implication that Butman was a gambler and the testimony did not rise to the level of plain error.

The other assignment of error is based on the contention that the government was in possession of leads as to sources of cash on hand which were not sufficiently investigated and thus the opening net worth used by the government was inaccurate and invalid within the teaching of *Holland* v. *United States*, supra, 348 U.S. 121, 135. These leads had to do with monthly income from the sale of a bar being received in 1959, the sum of $4,600 received on July 29, 1959 from a stockbroker, and the sum of $2,500 withdrawn from appellant's bank account on November 16, 1959. Another lead had to do with a loan to E. C. McGee in the amount of $1,000 which it is urged should have been included as a loan receivable in the opening net worth.

Accuracy in the opening net worth statement is important since the correctness of the end result depends on all assets being included at the outset. However, we are convinced from a careful consideration of the evidence that the government was not remiss in its handling of these leads. Considered in light of appellant's transactions during the year 1959 and in light of the opening net worth statement as of December 31, 1959, they were sufficiently accounted for within the teaching of *Holland*. There was no failure to negate reasonable explanations of appellant's net worth position which were inconsistent with guilt. The opening net worth statement included $2,000 cash on hand plus some $5,700 in banks. During 1959 appellant made a lump sum alimony settlement with his wife in the amount of

$13,300 and he admitted that $5,800 of this sum was paid in cash or checks. During the same year he spent $2,800 in cash for a swimming pool and also made certain loans. We think that these expenditures tend to account for the sums in question. The evidence of a loan being outstanding on December 31, 1959 to McGee was inconclusive.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 25997

D. C. Docket No. 66-103-Orl-Cr & 67-7-Orl-Cr.

WILLIAM A. AGORANOS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

Before PHILLIPS,* BELL, and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 2, 1969

Issued as Mandate: May 3, 1969

* Of the Tenth Circuit, sitting by designation.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25997

WILLIAM A. AGORANOS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

(April 30, 1969)

[U.S. Court of Appeals, Filed Apr. 30, 1969,
Edward W. Wadsworth, Clerk]

ON PETITION FOR REHEARING

Before PHILLIPS,* BELL, and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

* Of the Tenth Circuit, sitting by designation.

CERTIFICATE OF SERVICE

I Hereby Certify that a copy hereof has been furnished to the United States Attorney, P. O. Box 2841, Tampa, Florida, by United States Mail, this 28 day of May, 1969.

ELI H. SUBIN
Attorney